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C O N F I D E N T I A L SECTION 01 OF 04 KYIV 000789

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SUBJECT: UKRAINE: INTERPRETING THE CONSTITUTION: NO CLEAR
VIKTOR IN POLITICAL CRISIS

REF: A. KYIV 784
[B](#). KYIV 746

Classified By: Ambassador for reasons 1.4(a,b,d).

[1](#)1. Summary and Comment. As Ukraine's political crisis proceeds, both sides argue that they have the constitutional and legal upperhand and are acting in support of democracy and the rule of law. President Yushchenko has dismissed the Rada, and his team maintains the Rada's powers have been curtailed, while the Rada majority maintains his decree disbanding the Rada is illegal, and it continues to work (ref A). Prime Minister Yanukovych, Deputy Head of the Presidential Secretariat Chaliy and opposition leader Tymoshenko all called in the diplomatic corps on April 3-4, in the wake of President Yushchenko's April 3 brief of G-7 Ambassadors, to make the pitch that his/her side was correct and to ask for international support. Yanukovych said that he is still seeking compromise but was ready to contest and election win, while the President's team indicated that he would insist on new elections, although the details on implementation of the decree were open to negotiation.

[1](#)2. (C) Comment: Our reading of the various constitutional clauses and laws involved suggests that Yushchenko's decree should be in effect as of April 3, the day of promulgation, until/unless the Constitutional Court rules otherwise, and that the Rada has the right to continue to work until a new Rada is elected. What is open to serious question is whether Yushchenko's decree is constitutional and whether the constitution was violated by MPs shifting to the majority coalition. These are questions are best suited for the Constitutional Court to decide. However, given the Court's reluctance to issue any rulings since it formed eight months ago and the willingness of all sides, to varying degrees, to adhere to a political resolution (either elections or a compromise) if it meets their interests, the Court currently appears unlikely to be the sole solution of this political stand-off. Meanwhile, rumors ran rampant through Kyiv on April 4 that Chairman of the Constitutional Court Chair Dombrovskiy had resigned or was hospitalized (Note-untrue; he chaired an all day session of the court judges at the court).
End summary and comment.

Constitutional and Legal Clauses: a brief primer

[1](#)3. (SBU) Note: A number of key constitutional articles form the basis of the dispute over the legal basis for Yushchenko's dismissal decree. The tension between explicit and implied constitutional powers are being interpreted by competing political forces to their advantage--a lack of constitutional clarity that by all rights should be defined by Ukraine's Constitutional Court. They include:

[1](#)A. Disbanding the Rada: Article 90 lays out three specific sets of circumstances under which the President has the right

to dismiss the Rada:

- if a coalition is not formed within one month of the new Rada convening;
- if the Rada does not appoint a new Cabinet within 60 days of the old Cabinet resigning; and
- if the Rada fails to hold a regular plenary session within 30 days of starting a session.

None of these conditions apply and Yushchenko's decree did not cite Article 90. Instead the President team, backed by opposition leader Tymoshenko, argues that Yushchenko's constitutional power to disband the Rada lies in the implied, broad powers of articles 102 and 5, in combination with Articles 83, 69, and 106. Article 102 states that the President is the guarantor of Ukraine's sovereignty, territorial integrity, observance of the constitution, and human and citizens' rights and freedoms. Article 5 states that that the people are the only source of power and sovereignty in Ukraine and that no one shall usurp that power. Article 69 states that the expression of the will of the people is exercised through elections. Article 83, para six, states that, according to election results and on the basis of common ground achieved between various political positions, a coalition of parliamentary factions shall be formed in the Rada.

1B. Status of dismissal decree/Rada MPs:

--There is nothing in the Constitution, the law on the Constitutional Court (CC), or in the CC rules that would suggest that the President's decree could be suspended pending a CC ruling. As with the controversial CabMin law, the decree should be considered in effect until the Court ruled otherwise.

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--However, Yushchenko's decree includes the clause: "Proposes to People's deputies of Ukraine to continue to fulfill their authorities as deputies that are not directly linked with the authority of the Verkhovna Rada." In other words, they could retain their status as MPs (with the requisite perks), but should relinquish their right to legislate.

--In contrast, Article 81, para three, states that the preterm termination of Rada deputies, caused by the preterm termination of the Rada as a whole, will take effect on the date of the first meeting of the new convocation of the Rada.

This means that Rada MPs are empowered to continue to work. (note: Rada Committees chaired by opposition MPs started to dismantle themselves April 4, following the Presidential decree interpretation).

1C. Formation of the coalition majority/MP status:

--Yushchenko has repeatedly cited Article 83, which mandates that, according to election results, a coalition shall be formed by factions, and Article 81, which states that an MP loses his seat in the Rada if he withdraws from the faction to which he was elected. These articles are at the center of the debate whether the current majority now represents an unconstitutional formation and whether factions have the right to expel MPs who switch sides.

PM: Solution Lies in Compromise or Constitutional Court

14. (C) On April 4, PM Yanukovych told the dip corps that if an agreement could not be reached with the President, implementation of the decree should wait for the CC to take a decision, which he hoped would take no longer than one month.

He saw no constitutional grounds for the President's decree; article 90 was the only way to dissolve the Rada early. Yushchenko had placed personal political interests over the interests of the country, he asserted, adding that he wanted a win-win situation. He claimed Yushchenko had not really consulted with the Rada and did not warn them about possibly dissolving the Rada, suggesting the dismissal scenario had

been planned. Yushchenko's actions could split Ukraine, he warned; people did not want another election. However, if elections occurred, Regions would compete and win. Yanukovych maintained that the free flow of MPs between factions and from the opposition to the coalition was legal, but suggested the Rada might find a compromise via the Rada Rules under which all factions would comply with a formula for factions sizes that could be the equivalent of an imperative mandate.

15. (C) Yanukovych asserted that the way out of the current crisis was dialogue and compromise, perhaps leading to a broad coalition. Negotiations were better than new elections. MPs who were leaving OU and BYuT disagreed with the opposition's plans to destabilize the Rada and to hold new elections, he stated. The crisis was all about certain people (implying Tymoshenko), who wanted to get back into power and were willing to disrupt the country to do so. All sides should accept a CC ruling, just as he had done with the Supreme Court ruling in 2004 (note: overturning the falsified second round). Yanukovych said he would argue to Yushchenko that he should cancel his decree for the benefit of the people--he claimed to have seen in Yushchenko's eyes that the President was not comfortable with the situation, but those around him were pushing him. If there were new elections, the President (i.e., Our Ukraine) would lose more than he had now.

President's Team: New Elections Only Way to End Crisis

16. (C) Deputy Head of the Presidential Secretariat Chaliy argued to the dip corps earlier on April 4 that: the shifting of MPs was a revision of the 2006 elections; the Constitutional Court had done nothing to review the unconstitutional laws adopted by the Rada; and the Universal had not been implemented. With all the constitutional concerns left unresolved, elections were the only remaining democratic option. Yushchenko would not back down from the decree, but he was flexible on how it would be implemented--some aspects of preparing for the elections were still open to negotiations. Yushchenko and Yanukovych had been meeting (note: four hours on April 3), and the President was trying to convince the PM to cooperate on new elections. The decree was constitutional and in force; the Rada had the right to appeal it to the CC, but until there was a ruling, the decree would remain in effect.

17. (C) Chaliy also argued that the Rada was not a valid body at this point. The decree was clear that its powers have been canceled; in contrast, the Cabinet was still completely

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legitimate. (note: Yushchenko has also emphasized publicly that he did not recognize the Rada as a valid, functioning institution. Defense Minister Hrystenko, one of two Yushchenko-appointed members of the Cabinet, refused to appear in the Rada on April 4 to present a bill on international military exercises because he was upholding Yushchenko's line that the Rada was invalid. The bill subsequently only received 5 votes in favor, 65 against, with 191 other coalition deputies not casting ballots and 189 opposition MPs not present--possibly an important and early casualty of this standoff. End note.)

18. (C) Chaliy later told Ambassador that Yushchenko had told a group of international journalists April 4 that he would accept the CC's decision as legally binding, but he hoped that decision would be based on reasoned legal opinions and not on political pressure. Nevertheless, even if the CC did rule, which the President's team doubted, the crisis still required a political resolution. (Note. This would be similar to the compromise in 2004, when all sides, Tymoshenko excepted, were willing to set aside constitutional requirements for amending the constitution to reach a political compromise on a third round of presidential

elections. End note.) The President wanted a political, democratic, and electoral decision. Yushchenko had been contacting and would continue to contact world leaders to explain his position and ask for their understanding. (note: Yushchenko also laid out his position in a April 4 Financial Times op-ed).

¶9. (C) Yushchenko's representative to the Constitutional Court Shapoval made a similar legal argument to Ambassador that the people's will, expressed in the 2006 Rada elections, was not being honored (ref B). The coalition grossly violated the constitution, directly violating article 83 by allowing individuals to help form the coalition--the language is "coalition of factions" not "coalition of MPs"--and indirectly violating articles 69 and 5 because large numbers of MPs switching sides contradicted the results of the 2006 election, which usurps the power and sovereignty of the people. In most parliamentary democracies, he argued, the majority is formed ad hoc, but in Ukraine it is clearly regulated in the constitution. While article 90 gives specific grounds for the President to dissolve the Rada if he wants, articles 102 and 5 also give him the discretion and obligation to act to protect the constitution. If broad articles like 102, 69, and 5 were not honored, the Constitution would lose its meaning and force.

Tymoshenko: supportive of Yushchenko

¶10. (C) Tymoshenko on April 3 made comments similar to Chaliy's to diplomats. Yushchenko's decree was lawful and in force until the CC ruled otherwise. Yushchenko's role as guarantor of the constitution as enshrined in article 102 must be enforced if others were violating the constitution. The international community should recognize the decree, even if the Rada ignored it. There were myriad legal opinions on the constitutionality of the decree, but Yushchenko would never change his mind on elections. He was generally an indecisive man and one who wanted compromise above all else. However, having reached the point that new elections were the only solution, he was serious and would not be persuaded otherwise.

Where is the Court?

¶11. (C) Comment: The Constitutional Court, which should be at the center of cutting through this Gordian knot, as well as resolving dozens of issues which have emerged in the past two years, has still not issued a single ruling in the eight months since its full complement of judges had been seated; it was inquorate for the 18 months before that because the parties comprising the coalition (Regions, Socialists, Communists) refused to seat judicial nominees. All sides have accused others of pressuring the judges. The increased focus on the Court has also led to multiple rumors about the status of the Court and its judges. For instance, as Chairman of the Court Dombrovskiy presided over an all-day session of court judges April 4, statements by PM Yanukovych, Speaker Moroz, other ministers and MPs had Dombrovskiy variously submitting his resignation, in the hospital, or unable to be located. Early indications of the Court's unwillingness to tackle politically charged issues--a preliminary vote in February not to overturn an August 2006 law banning the CC from reviewing the 2004 constitutional reforms (essentially the right of judicial review) and another preliminary vote not to review the controversial CabMin law (which had provisions that even coalition figures

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admitted were unconstitutional)--suggest the Court may not be in a position to play a constructive role in resolving the current crisis. At a minimum, the Court's hesitation and inaction has given rise to doubts about its ability to rule solely on the legal merits of an issue rather than taking political interests into account.

¶12. (U) Visit Embassy Kyiv's classified website:
www.state.sgov.gov/p/eur/kyiv.
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